No. 80-1180

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1980

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WILLIAM A. McCALL, SR., and THE ESTATE OF OLAF HENRY NELSON, Deceased,
Petitioners,

v.

JAMES G. WATT, Secretary of the Interior of the United States of America, et al.,
Respondents.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
IN CASE No. 78-1065

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# PETITIONERS' RESPONSE TO BRIEF OF THE FEDERAL RESPONDENTS

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# PETITIONERS' RESPONSE TO BRIEF OF THE FEDERAL RESPONDENTS

The Government's brief recites platitudes which are beside the point in order to divert the Court's attention from the important issue presented by this case: that the Court should act now to check the Interior Department's Bureau of Land Management in its progressive alteration of the mining law from the way Congress wrote it, by substituting administrative policy in place of the law.

Petitioners made abundantly plain at every stage of the case that they are seeking patent only to lands which contain the valuable mineral deposits offered by Congress in 30 U.S.C. §22. The Government's own witnesses established that each ten-acre tract of the partially patented mining claims here in question contains a large tonnage of the valuable sand and gravel which was locatable and patentable at the time when patent was applied for. The Government's witnesses failed to show that the increased cost of producing the material from areas which contain a layer of cemented gravel at or near the surface would prevent mining there. To the contrary, the evidence showed that the cemented gravels make high specification material. Although the profit might be smaller than that from loose surface gravels, the potential for profit was still present, and the mining of such gravel has become

easier and cheaper with the passage of time as heavier machinery became available.

The Government's position in this case has been to disclaim that it required proof of actual sales and at the same time to grant patent only to those portions of the claims where the agency recognized that active commercial production had occurred.

In practice, the agency has followed the discredited doctrine of Osborne v. Hammit, 377 F Supp 977 (D Nev. 1964) and denied patent unless the claimant proved that each tract was "mineral in character" by "demonstration of removing and marketing at a profit." 79 I.D. at 465, Appendix to Petition A-39. This is certainly extending the "discovery" requirement to "mineral in character", even though the agency denies doing so. If, as the agency asserts, "mineral in

character" can be proven by geologic inference without actually exposing the valuable mineral deposit, then the marketability aspect of the discovery requirement should not be extended to every ten-acre tract of a mining claim where discovery is acknowledged to have been made on another part of the claim.

No statute authorizes the Government's "ten-acre rule", which is an amendment to the mining law by administrative policy, recognized in the court below as a question of first impression in the courts. This Court should grant review of this issue, and also of the "too much" administrative policy which was the basis for the agency's rejection of the tracts here in question. (See Petition p. 23).

The Government's brief could not deny that the fourteen ten-acre tracts were lopped off the claims patented, not for lack of mineral value but because

they contained too much of the mineral for which portions of the claims were patented. Here again, no statute authorizes the Bureau of Land Management to limit the amount of mineral ground which a citizen may acquire. This Court should restrict the agency to administration of the mining law as it was written by Congress, instead of changing the law by administrative policy decisions which serve as precedents of lasting detriment to the mining industry.

Addressing the Tenth Annual Rocky Mountain Law Institute in 1965, H. R. Hochmuth, then Associate Director of the Bureau of Land Management, stated candidly that what the agency was administering was not the mining law, but the rather substantial body of legal and quasi-legal precedents which largely are of the agency's own making. That policy has gone entirely too far. Congress, not

the agency, makes the laws.

In Ernst and Ernst v. Hochfelder, 425 U.S. 185, 213 (1976), this Court did not hesitate to correct an over-zealous effort of the prestigious Securities and Exchange Commission to expand the law by administrative interpretation beyond what Congress had enacted. Likewise here, this Court should hold back the Interior Department's Bureau of Land Management from rewriting the law by deciding cases on the basis of administrative policy.

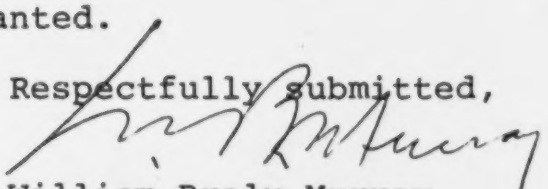
## CONCLUSION

The steady expansion of the Bureau of Land Management's power over mining claims by decisions of the Interior Department's administrative tribunals is subjecting the miners of this country to a rule not of law but of agency policy. Administrative legislation has gone too far, and it is time for this Court to

halt the process.

Accordingly, petitioners respectfully submit that the writ of certiorari should be granted.

Respectfully submitted,



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